(2) Supreme Court, U.S.
FILED
04-969 OCT 18 2004
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

BILLIE J. SAUNDERS, individually and as Personal Representative of the Estate of James E. Saunders, Deceased; JAMES E. SAUNDERS, deceased

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ Of Certiorari
To The United States Court of Appeals

SUPPLEMENTAL APPENDIX

Brian J. Iller
RETTIG OSBORNE FORGETTE
6725 W. Clearwater Avenue
Kennewick, WA 99336
Telephone: (509) 783-6154

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington

JAN 21 2003

JAMES R. LARSEN, CLERK DEPUTY
SPOKANE, WASHINGTON

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BILLIE SAUNDERS, et al. Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	No.CV-01-05099-RHW ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment brought by the parties. Plaintiff brings summary judgment on the issue of liability, seeking to find (a) that the

Government was negligent as a matter of law, and (b) that as a matter of law, the Government's negligence was the proximate cause of the death of the decedent (Ct. Rec. 12). The Government also moves for summary judgment on the issue of liability, seeking to find that the Government was not liable for the death of Mr. Saunders as a matter of law (Ct. Rec. 17).

BACKGROUND

To a large extent, the facts in this case are undisputed. This case involves a wrongful death action brought by the widow of James E. Saunders against the United States. On October 7, 1999, Nicolas Solorio Vasquez ("Vasquez") murdered Washington State Trooper James E. Saunders during a routine traffic stop. At the time of the murder, Vasquez was free on bail, awaiting trial on charges of drug trafficking. Vasquez was arrested on those charges on July 26, 1999, and was booked into the Franklin County Jail on that date. At the time of his arrest, Vasquez was an illegal alien and aggravated felon. Nevertheless, the Immigration and Naturalization Service ("INS") never placed an INS hold on Vasquez during his detention at the jail.

The INS agents were notified that Vasquez was in custody at the Franklin County Jail. On July 27, 1999, the jail faxed a daily booking sheet to the Richland, Washington INS office that named all persons that had been placed in custody of the jail in the previous 24 hours. Vasquez's name, along with the charges for which he had been arrested, appeared on that fax. In addition to being notified of Vasquez's incarceration, the INS agents visited the jail on six separate occasions between July 26, 1999, and August 9, 1999. Had the INS placed a hold on Vasquez, he would not have been able to obtain a bail bond. Even if Vasquez had been able to obtain a bond, imposition of an INS hold would have resulted in Vasquez being turned over to the INS for deportation upon his release on bail.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment,

a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

"When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

B. Plaintiff's Liability Claims

Plaintiff brings this action under the Federal Tort Claims Act ("FTCA"). The FTCA is a waiver of sovereign immunity with respect to claims based on injuries caused by the negligent or wrongful acts of federal employees acting within the scope of employment. *See Laird v. Nelms*, 406 U.S. 797, 799 (1972). As to tort claims under the Act, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances."

28 U.S.C. § 2674. The determination of liability is based on the law of the state where the alleged acts or omissions occurred. 28 U.S.C. § 1346(b). Washington tort law is, therefore, controlling.

To establish negligence under Washington law, a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *See Mucsi v. Graoch Assoc. Ltd. Partnership No. 12*, 144 Wash. 2d 847 (2001). Plaintiff moves for summary judgment on all four of these elements.

1. Existence of a duty

The parties vigorously dispute whether, as a matter of law, the United States owed Trooper Saunders a duty of care. Under Washington law, "[a] breach of a duty imposed by statute . . . shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence." RCW 5.40.050.

Any duty that arises in this case gets its genesis from 8 U.S.C. 1226(c). That statute states, in pertinent part:

> The Attorney General ***shall take into custody*** any alien who--
>
> > (A) is inadmissible by reason of having committed any offense covered in section

> 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (emphasis added). There is no dispute that Vasquez met the substantive requirements of the statute because he had two prior felony cocaine convictions in 1996, thus qualifying him as a alien subject to the act under subpart (B).

Consequently, Plaintiff maintains that under 8 U.S.C. § 1226(c), the United States had a mandatory duty to detain

Vasquez when he was released on bail.[1] Defendant forwards two arguments as to why the statute did not impose a duty on the Government. First, the Government argues that regardless of the fact that Vasquez was an "alien" as defined in the statute, the statute contains a temporal requirement that triggers the duty to detain only when an alien has been released from a sentence. Since Vasquez was released on bail prior to serving any sentence for the crime with which he was charged, the United States claims it had no duty to detain Vasquez. This argument focuses on the meaning of the term "released" as employed in the statute. Second, the United States contends that even if it had the responsibility to detain Vasquez, the Government did not owe a duty to Trooper Saunders under the public duty doctrine articulated under Washington tort law.

(a) ***Is a release on bond a "release" as contemplated under the terms of 8 U.S.C. § 1226?***

---

[1] The plain meaning of the term "shall" in a statute is that the action required is mandatory. *See Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wash. App. 393, 398-99 (2002).

As noted, the Government maintains that the statute requires a conviction on the crime for which a criminal alien is being held before the detention requirement takes effect. The Government asserts that the plain language of the statute supports this interpretation, as does the reasoning of a limited number of courts that have addressed the meaning of "release" under the statute.

Contrary to the Government's contention, however, the plain language of the statute does not support the reading the Government advances. The statute says the detention requirement is prompted "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c). Thus, the statute communicates quite clearly that detention should occur "when the alien is released," without more. The list of various types of release that follow are not qualifiers as to what constitutes a "release" under the statute, but rather are an expression that detention should occur no matter the type of release at issue.

There is no indication that these types of "releases" are the only "releases" that warrant detention under the statute, *i.e.*, the statute is not phrased in exclusive language.

Moreover, the amendments made by Congress to the statute in 1991 demonstrate that the statute does not support the reading the Government urges. Prior to 1991, the statute read:

> The Attorney General shall take into custody any alien who. . .[commits any of the numerous criminal acts specified] . . . ***upon completion of the alien's sentence***.

See P.L. 102-232 (emphasis added). Thus, prior to 1991, the statute read such that it supported the Government's position. Yet, Congress specifically struck the emphasized language with the amendment of the act in 1991. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386 (1995). It is now clear that under the plain language of the statute, Congress intended the Government to detain aliens upon their release, whenever that occurs, and regardless of whether that occurs before or after completion of a particular alien's sentence.

The case law cited by the Government likewise does not sustain its claim. The Government cites three cases that it maintains supports its position that the statute only requires detention after completion of an alien's sentence: *Cuomo v. Barr*, 812 F. Supp. 324 (N.D.N.Y. 1993), *Lepez-Mejia v. United States Immigration and Naturalization Service*, 798 F.2d 625 (C.D. Cal. 1992), and *Hoang v. Comfort*, 282 F.3d 1247 (2002).

In *Cuomo*, the court merely held that a specially created "conditional parole for deportation only" program instituted by the State of New York did not constitute a release pursuant to parole as contemplated by the statute because the program only effectuated a transfer of custody. Nowhere in the opinion does the court state, or even imply, that a "release" under the statute only occurs after completion of an alien's sentence. *See Cuomo* 812 F. Supp. at 328. *Lepez-Mejia* is inapplicable because the court there was interpreting the pre-1991 version of the statute. Lastly, the court in *Hoang* simply stated in passing that "under [§ 1226(c)], the Attorney General is directed to detain 'deportable' criminal aliens following release from their original sentences prior to decisions on their removal from

the United States." 282 F. 3d at 1252. While this statement is perfectly accurate, it certainly does not establish that, as a matter of law, the statute's detention obligations are *only* triggered upon completion of an alien's sentence.

Thus, none of the Government's arguments concerning the language of the statute are persuasive. As a result, it appears that the plain language of 8 U.S.C. § 1226(c) imposed a mandatory duty on the United States to detain Vasquez upon his release from the Franklin County Jail on bail.

(b) Does Washington's public duty doctrine defeat the basis of any duty owed by the United States to Trooper Saunders?

Washington recognizes a tort rule called the public duty doctrine. *See Taylor v. Stevens Cy.*, 111 Wash. 2d 159, 163. Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the inured person as an individual and was not merely the breach of an obligation owed to the public in general. *See J.B. Dev. Co. v. King Cy.*, 100 Wash. 2d 299, 303 (1983).

The doctrine is not favored in Washington. The Washington Supreme Court has noted that "[w]e have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit" and that "injured plaintiffs suffer harshly under the doctrine." *See Bailey v. Town of Forks*, 108 Wash. 2d 262, 267 (1987). As a result, Washington has carved out four exceptions to the public duty doctrine. These exceptions include: (1) when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent); (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce); (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff (rescue doctrine); or (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances

inherent in a duty vested in a governmental entity (special relationship). *Id* at 267-68.

The Government addresses only the applicability of the first exception—legislative intent to protect a specific class—in its moving papers, and contends that the exception does not apply because the purpose of the detention statute is only to protect society at large. Plaintiff claims that (a) Trooper Saunders was, indeed, within a specific class of individuals intended to be protected by the mandatory detention statute; and (2) the failure to enforce exception applies to the United States.

(i) The legislative intent exception

Federal courts have indicated that 8 U.S.C. § 1226 promotes the dual interests of ensuring that criminal aliens will appear at pending immigration proceedings and protecting society from the dangerous propensities of criminal aliens. *See Nguyen v. Fasano*, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000); *cf. Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). The Ninth Circuit has echoed these determinations, finding that the purpose of 8 U.S.C. § 1226 is

to "protect society." *See Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991). There is no indication that the statute is intended to protect some particular class of society.

Plaintiff argues that the legislative history of the statute reveals that one of the primary purposes of the mandatory detention provision was to reduce the burdens on law enforcement created by the release of criminal aliens into the population. Even if this is true (and the legislative history does appear to support the claim), the intent of the statute still was not to "protect" law enforcement officials, rather only to lessen their work loads.[2] The "legislative intent" exception does not apply.

(ii) The failure to enforce exception

The failure to enforce exception requires a plaintiff to satisfy three factors: (1) governmental agents responsible for enforcing statutory requirements must have actual knowledge of a statutory violation; (2) the agents must fail to take corrective action; and (3) the plaintiff must be within the

---

[2] Plaintiff maintains that the present case is indistinguishable from *Bailey v. Town of Forks*, 108 Wash. 2d 262 (1987). Yet, in *Bailey*, unlike here, the court was able to define a specific class of persons the statute at issue was meant to protect—users of public highways. As noted above, Plaintiff is not able to identify any particular class besides "society" in general, which does not suffice.

class the statute was designed to protect. *See Coffel v. Clallam Cy.*, 58 Wash. App. 517, 523 (1990). All that is required to show "actual knowledge" is knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself. *Id.* As long as the trier of fact can determine that the defendant had knowledge of the facts constituting statutory violations, that is enough to show actual knowledge. *Id.* Also, circumstantial evidence may support a finding of actual knowledge. *See Waite v. Whatcom Cy.*, 54 Wash. App. 682 (1989). Constructive knowledge, however, is insufficient under the failure to enforce exception.[3] *See Moore v. Wayman*, 85 Wash. App. 710, 724 (1997).

Here, there is no dispute that the INS received the faxed notice from the Franklin County Jail and that the notice contained Vasquez's criminal record and his country of origin. The faxed booking sheet, however, apparently did not

---

[3] Under Washington law, constructive knowledge is defined as "information which would lead a reasonable man in the same situation to believe that [the relevant] facts exist." *See State v. Kees*, 48 Wash. App. 76 (1987)

disclose whether Vasquez had previously been deported or removed. The INS databases would have divulged this information had Vasquez's name been searched.

The Government, thus, maintains that it did not have actual knowledge because it would have been required to conduct further investigation to determine whether Vasquez must be detained and deported. In support of its argument, Defendant notes that Washington does not recognize a duty to investigate and, thus, it maintains that the United States did not owe a specific duty to Trooper Saunders to investigate the criminal status of Vasquez. *See Corbally v. Kennewick School Dist.*, 94 Wash. App. 736, 740 (1999) (claim for negligent investigation is not cognizable under Washington law); *cf. Rodriguez v. Perez*, 99 Wash. App. 439, 443 (2000) (duty of police officers to investigate crimes is duty owed to public at large and is, therefore, not a proper basis for individual's negligence claim).

Construing the evidence most favorably to the nonmoving party, a rational trier of fact could reasonably infer actual knowledge to the INS. The INS had all the facts it needed via the fax and its own data banks to possess actual knowledge that Vasquez was subject to detention under

8 U.S.C. § 1226. The duty to investigate does not have any bearing on this conclusion in that Plaintiff is not trying to impose such a separate duty on Defendant. Moreover, whether the INS chose to investigate Vasquez's status is irrelevant under the "failure to enforce" exception in that the INS database did, indeed, contain facts that, when coupled with those facts included in the fax sent from the Franklin County Jail, showed Vasquez was subject to detention under the statute. Knowledge of information contained in the INS's own database should be imputed to the Government under the actual knowledge requirement.

Having found that the INS did, indeed, have actual notice, the Court must still address another issue. While the record clearly indicates that the INS failed to take corrective action (thus satisfying prong two of the "failure to enforce" exception), the issue of whether "the plaintiff . . .[is] within the class the statute was designed to protect" presents a more difficult question. The problem is determining whether the "protected class" requirement of the "failure to enforce" exception requires that the "class," as defined in the relevant statute, be "a particular and circumscribed" class, or something to that effect, in order for the exception to apply.

There is no clear answer in the case law, as this appears to constitute a question of first impression in Washington.

Nonetheless, the case law that exists suggests that in order for the "failure to enforce" exception to apply, the relevant statute must, indeed, identify a specific class of people it intends to protect that is more particularized than "the general public." Washington courts narrowly construe the failure to enforce exception. *See Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash. 2d 506, 531, 799 P.2d 250 (1990). The public duty doctrine is employed to determine if the alleged "duty is one owed to a nebulous public or whether that duty is owed to a particular individual." *Honcoop v. State*, 111 Wash. 2d 182, 188 (1988). As noted, 8 U.S.C. § 1226 is not intended to protect a particular class but, rather, is intended to protect a general class—society as a whole. To hold that the "failure to enforce" exception applies to a statute that identifies the public at large as the class it intends to protect would effectively eviscerate the policy considerations identified as supporting the public duty doctrine. *Cf. Taylor*, 111 Wash. 2d. at 168. In this regard, the exception would envelop the rule, which is clearly an improper result. Thus, because such

a general class definition does not suffice under the failure to enforce exception, that exception is inapplicable here. As such, the public duty doctrine applies to this case and defeats any duty owed by the Government to the decedent.

2. Breach of the Duty

Plaintiff maintains that the United States had a mandatory duty to detain Vasquez, and because it failed to do so, it breached its duty.[4] *See* footnote 1, *supra*. The Government claims that it is not liable because the decisions surrounding Vasquez's detention were discretionary and, thus, it is immune from liability under the FTCA.

Summary judgment is appropriate for breaches of duty based on statutory violations unless the violator provides a justification or excuse for the violation. *See Pudmaroff v. Allen*, 138 Wash. 2d 55 (1999). The Government does not offer any such excuse. Rather, the

---

[4] Given the novel nature of the duty question at issue in this case, the Court addresses the issues of breach and proximate cause despite finding that the Government did not owe a duty to Trooper Saunders so that those issues are resolved should this case come back to this Court on remand from an appellate court.

Government maintains that its failure to act is excused because its actions were discretionary and, thus, fell under the discretionary function exception of the FTCA.

The discretionary function exception excludes any claim "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In determining whether an act or omission falls within the discretionary function exception, courts follow a two-part test. First, the court must determine whether the conduct at issue was a matter of choice for the acting employee. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, the court must consider whether the agent's or agency's decision is of the type that the discretionary exception was designed to protect.[5] *Id.*

A statute with mandatory language negates the discretionary function exception when it contains "specific and mandatory" wording that "creates clear duties incumbent upon the governmental actors." *See Kennewick Irrigation*

---

[5] The parties contest only the first prong of this test, so the applicability of the second prong of the test is not discussed by the Court.

Dist. v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989). Nothing in 8 U.S.C. § 1226 suggests that the duty to detain aliens is at all discretionary. Courts have uniformly found that the obligation to detain is mandatory. *See, e.g., Patel v. Zemski*, 275 F.3d 299, 305 (3rd Cir. 2001); *Badio v. United States*, 172 F. Supp. 2d 1200, 1202 (D. Minn. 2001). Moreover, it appears from the deposition testimony submitted in support of Plaintiff's summary judgment motion that the INS agents in the field in Franklin County understood that their duty to detain was mandatory.

Defendant argues that because the INS in Franklin County has limited resources, the INS agents regularly had to make choices as to whom to investigate and detain. Defendant thus claims that the discretionary function exception is applicable because the detention statute does not tell the INS agents how to detain aliens. This argument misstates the issue, however. The issue is not whether the INS has discretion in the methods it uses to detain, but rather whether the INS has discretion to detain in the first place. Simply because the INS may have chosen as a matter of practice to pursue only certain individuals does not relieve it from its duties under the statute. The United States had a

mandatory duty to detain Vasquez, and because it admittedly failed to do so, it breached its duty as a matter of law.

3. Proximate Cause

Under Washington law, proximate cause consists of two elements: (1) cause in fact; and (2) legal causation.[6] *See McCoy v. American Suzuki Motor Corp.*, 136 Wash. 2d 350 (1998). Under this analysis, the defendant's actions are the cause, in fact, of plaintiff's injuries if the defendant's wrongdoing produced the injuries complained of and any intervening cause was reasonably foreseeable. *See Maltman v. Sauer*, 84 Wash. 2d 975, 982 (1975). Whether an independent cause is reasonably foreseeable is generally a question of fact for the jury. *See id.* Legal cause is decided by the court and is concerned with how far the defendant's liability should extend. *See Hartley v. State*, 103 Wash. 2d 768 (1985).

Plaintiff argues that, as a matter of law, she is entitled to summary judgment on the issue of proximate cause because a reasonable trier of fact can only reach but one

---

[6] The parties do not dispute that if the United States did, indeed, owe a duty toward Trooper Saunders, and if the United States breached that duty, the murder of Trooper Saunders constitutes a "resulting injury" as required to prove a cause of action for negligence.

conclusion—that the INS's failure to detain Vasquez was the proximate cause of Trooper Saunders's untimely death. The Government asserts that it is entitled to summary judgment on the proximate cause issue because the incident leading to Trooper Saunders's death was not within the "general field of danger" that Defendant reasonably should have anticipated and, thus, his death was not foreseeable as a matter of law. More specifically, the Government maintains that Vasquez's act of murdering Trooper Saunders constituted an intervening and unforeseeable act.

The Washington Supreme Court has held that intervening criminal acts may be found to be foreseeable. *See McLeod v. Grant City School Dist.* 128, 42 Wash. 2d 316 (1953). In this instance, the question of foreseeability is whether the actual harm at issue fell within a general field of danger that should have been anticipated by the Defendant. *Id.* Thus, it is not the unusualness of the act that results in injury to the plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of hazards covered by the duty imposed upon the defendant. *See Rikstad v. Holmberg*, 76 Wash. 2d 265 (1969).

Plaintiff argues that because Vasquez was an aggravated felon that Congress had mandated be kept in custody for the purpose of protecting society, Trooper Saunders's murder fell into the "general ambit" of hazards that the United States should have anticipated when it released Vasquez. The United States argues the exact opposite, that it did not have adequate notice of Vasquez's propensity for violence and that there was no indication that failing to investigate his status would lead to such violent and tragic consequences.

The Court may determine that a criminal act is unforeseeable as a matter of law if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. *McLeod*, 42 Wash. 2d at 321-23. While it is generally foreseeable that criminals may commit crimes and that aggravated felons may engage in criminal activity while released on bond, that level of foreseeability does not make the criminal's acts the legal responsibility of everyone who may have contributed in some way to the criminal opportunity. Even assuming that the INS's failure to place a hold on Vasquez was a cause-in-fact of Trooper Saunder's death, the murder did not constitute an injury of the general

character that might reasonably have been anticipated by the Government. This is particularly true considering that Vasquez's prior conviction—which formed the basis of his classification as an "aggravated felon"—did not involve the commission of a violent crime, but rather the nonviolent crime of drug trafficking. The events were so improbable as to fall outside the general field of danger that could have been anticipated by the Government. As such, Vasquez's act constitutes a superseding act that precludes the imposition of liability on the Government as a matter of law.

Thus, in sum, Plaintiff has failed to show that the Government owed the decedent a duty of care. Moreover, even if a duty was owed (in which case the Government breached its duty), as a matter of law, that breach was not the proximate cause of Trooper Saunder's death. Accordingly, **IT IS HEREBY ORDERED:**

1. The Motion by Plaintiffs Billie J. Saunders and James E. Saunders for Partial Summary Judgment on Liability (Ct. Rec. 12) is **DENIED**; and

2. The Motion by Defendant United States for Summary Judgment is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 21st day of January, 2003.

/s/
ROBERT H. WHALEY
United States District Judge